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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-404

LEWIS COLTEN ..... APPELLANT

Vs.

COMMONWEALTH OF KENTUCKY ..... APPELLEE
ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS AND/OR AFFIRM AND BRIEF IN SUPPORT

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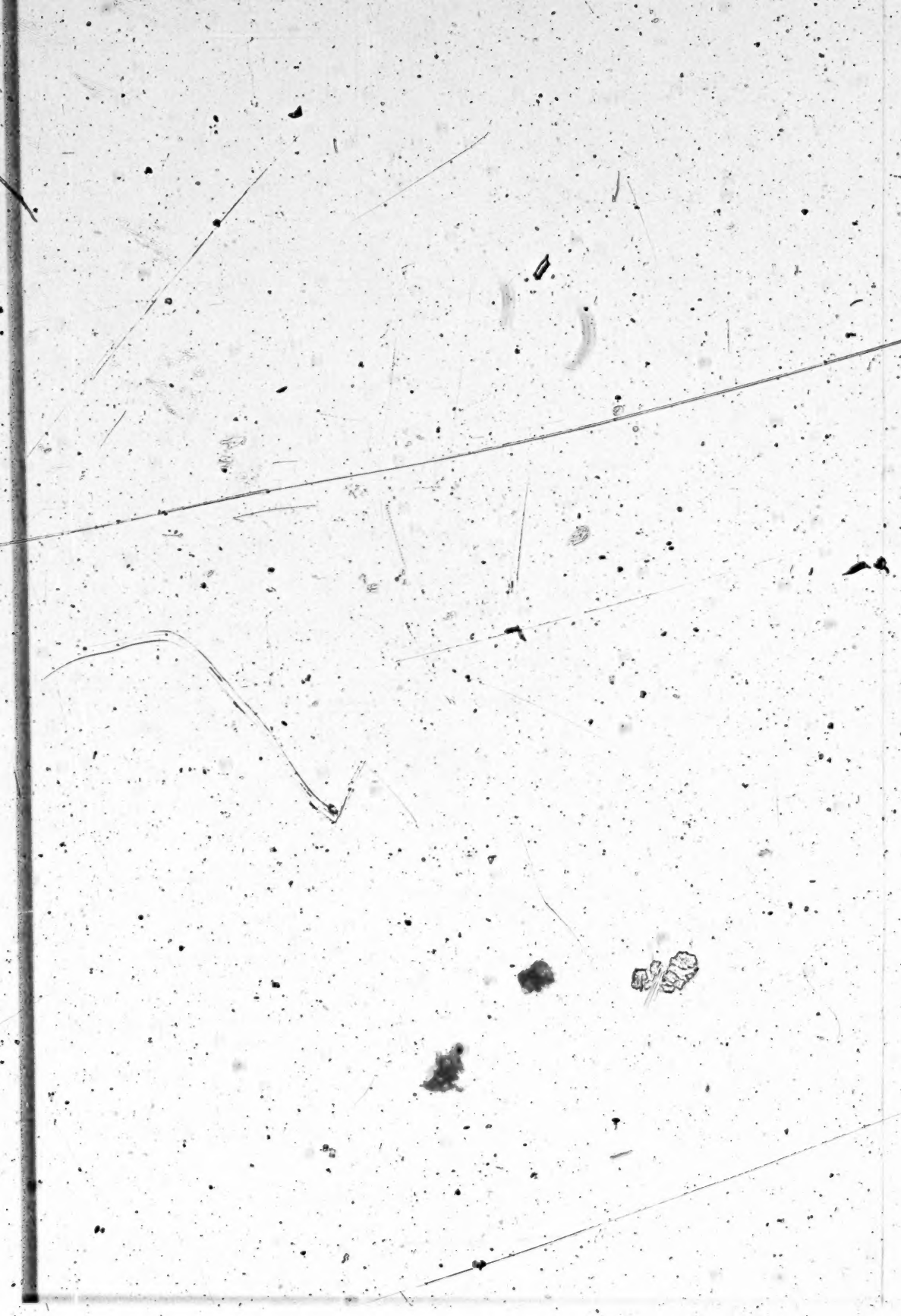

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LEWIS COLTEN ---------- *Appellant*

Vs.

COMMONWEALTH OF KENTUCKY ---------- *Appellee*

MOTION TO DISMISS AND/OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee moves that this appeal be dismissed, or in the alternative, that the final judgment of the Court of Appeals of Kentucky be affirmed, and as grounds for this Motion states:

1. The questions presented by appellant are not substantial Federal questions under the circumstances of this case. Appellant was not engaging in protected conduct and therefore may not rely on the theory of vagueness and overbreadth.

2. Brief in support of this Motion is filed herewith pursuant to Rule 35.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 71-404, October Term, 1971

LEWIS COLTEN ..... *Appellant*

Vs.

COMMONWEALTH OF KENTUCKY ..... *Appellee*

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion below from the Court of Appeals of Kentucky is reported as Colten v. Commonwealth, 467 S.W.2d 374 (1971).

JURISDICTION

Appellant contends jurisdiction is conferred by 28 USC § 1257 (2).

QUESTIONS PRESENTED

I.

WHETHER IN THIS CASE, IN WHICH APPELLANT WAS CONVICTED OF DISORDERLY CONDUCT FOR FAILING TO DISPERSE UPON LAWFUL ORDER OF THE POLICE THE QUESTIONS OF (1) VAGUENESS AND OVERBREADTH OF THE LAW AND (2) UNCONSTITUTIONALITY

OF APPLICATION OF THE DISORDERLY CONDUCT LAW TO FACTS IN THIS CASE ON FREEDOM OF ASSEMBLY AND SPEECH GROUNDS, ARE SUBSTANTIAL.

II.

WHETHER THE FACT THAT APPELLANT EXERCISED HIS RIGHT TO A TRIAL DE NOVO IN THE COURT OF GENERAL JURISDICTION AND RECEIVED A GREATER PENALTY THAN THAT IMPOSED IN A COURT OF LIMITED JURISDICTION RESULTED IN A DENIAL OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

STATEMENT OF THE CASE

This is an appeal from the Kentucky Court of Appeals affirming a decision in the Fayette Circuit Court imposing a fine of $50 upon the Appellant on a charge of disorderly conduct.

Appellant, Lewis Colten, was first found guilty on March 6, 1970 in the Fayette Quarterly for the misdemeanor. (T.R. p. 2).

Appellant filed a notice of appeal from the Quarterly Court judgment on March 18, 1970, (T.R. p. 1) On April 24 and 27, 1970, appellant was granted a *de novo* trial in the Fayette Circuit Court. (T.E. p. 1) Appellant elected to have his case tried without a jury. (T.E. p. 3) At the conclusion of the evidence the court found appellant guilty and fixed his fine at $50.00 (possible six-month jail sentence and $500.00 fine). KRS 437.016 (T.E. p. 206). The Kentucky Court of Appeals affirmed the decision of the Circuit Court on May 21, 1971.

Appellant testified at the trial that he and others were at the Bluegrass Field Airport on March 3, 1970 to conduct a counter-demonstration at the time Mrs. Nixon left from Lexington. (TE p. 114) Appellant stated that his group was protesting "against the pseudo volunteer program that she tried to force

down Lexingtonian's throats." (TE p. 106) Appellant stated that his group intended to ignore Mrs. Nixon and demonstrate in behalf of their gubernatorial candidate, Sam Mason. (TE pp. 102, 106)

Appellant's group was a coalition of the Young Democrats, Students for a Democratic Society, Student Mobilization Committee, and concerned students and citizens. (TE p. 107) Appellant was a member of the Steering Committee which runs the Students for a Democratic Society. (TE pp. 113, 115) Appellant considered himself a spokesman for the group, and he had given speeches at the airport that day. (TE pp. 104, 111)

After Mrs. Nixon's plane had departed, appellant's group formed a procession with their cars as they left the airport. (TE pp. 90, 104) One of the cars in the procession driven by *Guy Mendez* was stopped by State Trooper *John R. Miller* for having an expired Louisiana license plate. (TE pp. 6, 7, 159) Trooper Miller had earlier issued a citation to Norbert McGuire for having an expired license plate and an expired inspection sticker. (TE p. 6)

Mr. Mendez pulled his car over onto the shoulder of the Airport Road which leads from the airport to Highway 60. Trooper Miller parked his car behind Mendez's car. Appellant pulled his car in behind Trooper Miller's. (TE pp. 5-8) Appellant stated that other cars in the procession pulled over to the side of the road in front of and behind the three above mentioned cars. (TE pp. 91, 92, 107) A witness for appellant, *Gennelle Geis*, stated that from six to ten cars in the procession pulled over to the side of the road. (TE pp. 170, 174)

Trooper Miller testified that while he was talking to Mr. Mendez appellant "came up and wanted to know why I had stopped this automobile, and I explained to him that the vehicle had expired license plates and that I intended to give him a citation, and he insisted on questioning me as to why I was stopping him, and became quite obnoxious. I asked him to go

back to his car and clear the area and he did not. He stayed in the area and kept trying to get a conversation going." (TE p. 9)

Trooper Miller told appellant that he was not arresting Mendez. He only intended to detain him long enough to make out the citation. He thought appellant wanted to cause trouble because he did not leave. (TE p. 16)

Trooper Miller stated that because appellant was interfering with his giving the citation he and Mr. Mendez got inside Trooper Miller's car and rolled up the windows. (TE pp. 10, 16, 17) Trooper Miller finished making out the citation there. (TE p. 10)

Captain James Mayes, of Frankfort, was in command of the state troopers at the airport. (TE p. 23) He testified that 15 or 16 people were standing in the roadway around the cars. He stopped his car in the right hand lane as it was blocked by the group of people. (TE p. 26) He asked the crowd 4 or 5 times to leave. (TE pp. 27, 28) He noticed appellant in the group. (TE p. 29) Captain Mayes then walked ahead to clear the area. (TE p. 28) Trooper Miller had testified earlier that the traffic was heavy. (TE p. 12)

Trooper T. H. Brown stated that he stopped his car behind that of Captain Mayes. (TE p. 37) He heard Captain Mayes tell the group to move on away. (TE p. 38) He spoke to appellant twice and asked him to leave. (TE pp. 39, 47) Instead of getting into his car appellant walked around to the right side of the cars. (TE pp. 40, 47) Appellant stated that he wanted to see if anyone in Mendez's car wanted a ride. (TE p. 50)

State *Trooper Kenneth Harlowe* testified that he had earlier noticed appellant in the airport. At the time Mrs. Nixon's plane was leaving appellant stated that his group was going to have a party. According to Trooper Harlowe, they went out onto the grass "whooping and hollering" and creating a scene. (TE p. 68) Appellant and the others were also hindering people as they were going in and out of the airport. (TE p. 69)

Trooper Harlowe stated that appellant was in with the group of 12-18 people standing in the roadway next to Trooper Miller's car. (TE pp. 57-59) He stated that Captain Mayes asked the crowd to leave. Some of them did not, including appellant. (TE pp. 58-61) Appellant told Trooper Harlowe that he was going to stay around and see what happened. (TE pp. 60, 61, 63)

Appellant testified that Trooper Harlowe asked him to leave. (TE p. 96) Appellant replied "Well, okay, but can I take these people with me." Appellant stated that the Trooper then came up to him and said, "I'm going to tell you one more time, get out of here." Appellant replied, "Okay, I would like to take these people with me." Trooper Harlowe then grabbed appellant's arm and asked him again if he was going to leave. (TE p. 97) Appellant stated that he replied, "Sure, I'm going but can I take these people with me." (TE p. 98)

Trooper Harlowe turned appellant over to the men at the police wagon. (TE p. 74) Appellant testified that he had stopped his car as one of his "brothers" had been stopped by a police officer and he was concerned about that person being stopped. He stated that he stood behind Trooper Miller and did not say anything. (TE p. 92)

Appellant testified that he questioned Mendez as he was walking to trooper Miller's car. (TE pp. 93, 94, 109) Appellant stated that he wanted to tell Mendez that he (appellant) had gotten a six weeks extension in which to purchase his new Pennsylvania license plates. (TE pp. 94, 107) Appellant stated that he did not speak to Trooper Miller and he did not hear Trooper Miller talk to him. (TE pp. 95, 109)

While Mendez was sitting in Trooper Miller's car, appellant stated that he tapped on the window to ask Mendez if his car was being confiscated. (TE p. 96) Appellant stated that some of the people in Mendez's car thought that the car might be

taken. He told them that he had some room in his car if they needed a ride. (TE p. 95)

Appellant denied saying that he was going to stay around to see what happened. (TE p. 99) He stated that he did not see Captain Mayes. (TE pp. 100, 109)

Appellant's witnesses generally denied some of the allegations made by the State Troopers. *Sallie Phillips* testified that the witnesses had gotten together with the defense attorneys the day before the trial. They exchanged their views as to what they had seen. (TE p. 149) They were told that the differences in their stories were due to different standing positions. She stated that they were told to tell the truth. (TE p. 151)

All of the witnesses who had pulled over to the side of the road denied seeing no parking signs along the road. (TE pp. 121, 137, 156, 165) *Earl Craig Winkle* testified that he did not hear any orders to leave and did not see anyone standing in the road. (TE pp. 124, 129) Sallie Phillips did not hear any orders to leave the area until after appellant was apprehended. (TE p. 137) She did not see appellant standing in the road and she stated that there was no traffic on the road. (TE pp. 136, 138, 143, 145) Trooper Harlowe testified earlier that Lieutenant Moberly directed traffic around the area of congestion. (TE p. 60)

Guy M. Mendez, III testified that there were a large number of cars at the airport belonging to Young Republicans and other people. (TE p. 156) Mendez stated that Trooper Miller told him and the others in his car that his car would have to be towed in. (TE pp. 152, 153) He stated that appellant told Trooper Harlowe to let him go. (TE p. 156)

Gennelle Geis did not see any traffic. (TE p. 173) She stated that a state trooper asked her to leave. (TE p. 178) Appellant's other witness, *Gary Lee Seale*, saw some people in the roadway. (TE p. 168)

The trial court elected to believe the testimony of the state troopers. It found that appellant should have gone back with the others to their cars when directed to do so by Captain Mayes and the other State Troopers. The court found appellant guilty of the misdemeanor, disorderly conduct, and fixed his fine at $50.00. (TE pp. 202-206)

SUMMARY OF ARGUMENT

Appellant was not engaging in any protected conduct and may not challenge the law for vagueness or overbreadth; it is not overly broad or vague anyway.

The fact that Appellant exercised his right to a trial *de novo* in no way chilled his right to appeal.

ARGUMENT

I.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL.

The statute challenged as overly broad and vague is KRS 437.016, Subsection (f), stated as follows:

> (1) A person is guilty of disorderly conduct if with intent to cause public inconvenience, annoyance or alarm, or recklessly creating risk thereof, he: (f) congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse.

"Public" and "Public place" are defined in KRS 437.011

> "(1) 'Public' means affecting or likely to affect a substantial group of persons.
>
> "(2) 'Public place' means a place to which the public has access, and includes but is not limited to highways, transportation facilities, schools, places of amusement, parks, places of business, playgrounds and hallways, lobbies and other portions of apartment houses and

hotels not constituting rooms or apartments designed for actual residence."

It is difficult to comprehend appellant contending this statute to be unconstitutional by virtue of being overly broad and/or vague. It certainly is as narrow as the subject matter permits and specifically delineates the conduct prohibited. See *Cameron v. Johnson*, 390 U.S. 611 (1968) where this Court stated:

> " . . . We conclude that the statute clearly and precisely delineates its reaches in words of common understanding. It is a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be . . . proscribed. *Edwards v. South Carolina*, 372 U.S. 229, 236, 83 S. Ct. 680, 684, 9. L. Ed. 697."

Surely this statute cannot be considered to be drawn in language "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." See *Connally v. General Construction Company*, 269 U. S. 385, 391 (1926); *O'Leary v. Commonwealth, Ky.*, 441 S.W.2d 150, 156 (1969); *United States v. Petrillo*, 332 U.S. 1 (1947).

The appellee believes that the constitutionality of this statute must be judged on the basis of the facts present in this case and not some irrelevant, hypothetical situation. *United States v. Raines*, 362 U.S. 17 (1960); *O'Leary v. Commonwealth*, supra; 16 C. J. S. Constitutional Law § 94.

Appellant relies on *Edwards v. South Carolina*, 372 U.S. 229 and *Coates v. Cincinnati*, ____ U.S.____, 29 L. Ed. 214 (1971) as supporting his belief that his constitutional right to assemble was stifled. However, these cases are easily distinguishable in that both cases involved a legitimate purpose for assemblage while in the case at bar the conduct of appellant interferred with a legitimate police function, that being clearing the road of traffic.

The Kentucky Court of Appeals phrased a perfect answer to appellant's claim:

> "... Colten was not seeking to express a thought to any listener or to disseminate any idea. He simply was trying to irritate the police by his presence and by efforts at interruption. Nor was he exercising the right of peaceable assembly, because that right, we believe, contemplates that the assembly is for some bona fide purpose other than merely to assemble, and Colten's group appears to have had no purpose other than to cause inconvenience and annoyance. So the statute as applied here did not chill or stifle the exercise of any constitutional right." 467 S.W.2d 374, at 379

Appellant would have the Court hold that the First Amendment right to assemble and of free speech condones a person interefring with a policeman in the performance of his duties. We believe that this is an entirely untenable position. It is hard to imagine a more obvious and flagrant flounting of the law than is apparent in this case. After being asked and then told to leave some nine or ten times, appellant still refused to leave. Surely this is not constitutionally protected conduct.

II.

KENTUCKY'S SYSTEM OF ALLOWING A TRIAL *DE NOVO* IN THE CIRCUIT COURT (GENERAL JURISDICTION) FROM A JUDGMENT IN QUARTERLY COURT (COURT OF LIMITED JURISDICTION) DOES NOT CHILL THE RIGHT TO APPEAL AND DEPRIVE ONE OF ANY CONSTITUTIONAL RIGHTS.

Appellant bases his contention that the increase of the penalty at the trial *de novo* was unconstitutional, on *North Carolina v. Pearce*, 395 U.S. 711 (1969). Appellee believes that this case is easily distinguishable from the case at bar. *Pearce* stands for the proposition that a defendant's right, by appeal, to obtain relief from errors committed at the initial trial, cannot be "chilled" or stifled by the imposition of a greater penalty at his new trial,

in the absence of a showing of lack of vindictiveness or retaliation aimed at the defendant for exercising his right to appeal.

In this case, there is no concern for errors committed at the trial in the lower court. The appellant at his trial *de novo* participated in a whole new horse race.

A trial *de novo* is not an appeal in the sense of *Pearce*. Indeed, a person can plead guilty in quarterly court and still obtain a *de novo* trial in circuit court. *Brown v. Hoblitzell*, Ky., 307 S.W.2d 739, 746 (1956). The circuit court, by reason of its forum, would conduct a more thorough trial than a police or quarterly court. Indubitably there would be more evidence, more witnesses, and a broader legal emcompassment. The circuit court would therefore have much more upon which to base its decision. To go one step further, if appellant had not waived a jury, would he now complain that he jury could not increase the penalty adjudged in the quarterly court? Surely not. Cf. *Brooks v. Commonwealth*, Ky., 447 S.W.2d 614 (1969).

Therefore, the exercise of the trial *de novo* and the subsequent finding of guilty and the penalty thereby adjudged is not related to the decision of the quarterly court and is entirely independent. This is no way "chilled" appellant's right to appeal.

CONCLUSION

Because appellant does not present a substantial Federal question, this appeal should be dismissed, or in the alternative the decision of the Kentucky Court of Appeals should be affirmed.

Respectfully submitted,

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DATE: November 12, 1971

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, U.S. postage prepaid to Hon. Alvin L. Goldman, 1692 Williamsburg Road, Lexington, Kentucky 40504; Hon. Natalie Wilson, Citiens Union Bank Building, Lexington, Kentucky 40507; and Hon. Melvin L. Wulf and Sanford Jay Rosen, American Civil Liberties Union Foundation, 156 Fifth Avenue, New York, New York 10010, this 16 day of November, 1971.

Robert W. Willmott, Jr.
Assistant Attorney General